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No. 96-279

In the Supreme Court of the United States

OCTOBER TERM, 1996

HARRY S. STONEHILL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
DAVID ENGLISH CARMACK
ROBERT W. METZLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution affords persons whose property is under the control of a receiver the right to pursue litigation involving that property after the receiver, with the approval of the district court, settled the litigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 83 F.3d 1156. The opinions and orders of the district court (Pet. App. 13a-18a, 19a-22a, 23a-28a, 29a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1996. The petition for rehearing was denied on July 24, 1996 (Pet. App. 32a). The petition for a writ of certiorari was filed on August 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After an audit, the Commissioner of Internal Revenue determined that there were substantial deficiencies in petitioners' income tax for the taxable years 1958 through 1961 and that petitioners were liable for civil penalties due to fraud. In January 1966, the Commissioner made jeopardy assessments against petitioners. The United States then filed actions to reduce those assessments to judgment, to set aside certain fraudulent conveyances and to foreclose the tax liens on property owned by petitioners.[1] In 1980, the district court determined the amounts of petitioners' tax liabilities. In 1983, that determination was affirmed on appeal. *United States* v. *Stonehill*, 702 F.2d 1288, 1290-1293 (9th Cir.), cert. denied, 465 U.S. 1079 (1984).

The judgment in that case allowed the United States to foreclose on petitioners' assets. Since that judgment was rendered and the amount of the tax liabilities was determined, the United States has been seeking satisfaction of petitioners' unpaid federal tax liabilities through the foreclosure process (Pet. App. 29a).

In 1984, at the request of petitioners, the district court appointed a receiver to manage the assets and businesses of petitioners pending the tax lien foreclosure sales. These businesses included the Pine Street Corporation, which owned a parcel of real estate located in the Town of Tiburon, California (Pet. App. 2a, 16a). That real estate had a substantial value

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[1] These procedures were initiated prior to the enactment of 26 U.S.C. 7429, which provides for expedited administrative and judicial review of such assessments.

because of its suitability for residential development (*id.* at 2a).

From 1988 to 1994, the receiver, acting on behalf of Pine Street Corporation, submitted several applications to the Town of Tiburon for approval of a development plan for the real estate. During that period, however, Tiburon modified its General Development Plan to permit only less intensive development than had previously been allowed. The receiver challenged the validity of the new zoning plan in litigation brought in California state court against Tiburon on behalf of petitioners and Pine Street Corporation.[2] The receiver alleged that the zoning changes effected an inverse condemnation of the property and were invalid under state law (Pet. App. 2a-3a).

The parties attempted to settle this zoning dispute. After lengthy negotiations, the Town of Tiburon and the Marin County Open Space Committee offered to purchase the real estate for $6.8 million. This offer was, of course, subject to the condition that the receiver dismiss the lawsuits against the Town of Tiburon. When the offer was presented by the receiver to the court for approval, petitioners objected to the settlement. They contended that they should be allowed to conduct discovery concerning whether Tiburon had rezoned the property for the purpose of reducing its value so that Tiburon could then acquire

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[2] The lawsuits named the Harroman Company as the corporate owner of the property. The Harroman Company, however, was merged into the Pine Street Corporation effective May 31, 1966, before either lawsuit was filed. As a result of the merger, the Pine Street Corporation was the beneficial owner of the real estate that was the subject of the lawsuits and was the real party in interest (CR 984).

it. The district court denied petitioners' motion (Pet. App. 3a, 33a-39a).

Petitioners thereafter contended that they had personal claims against Tiburon that were not under the receiver's control. The United States then filed a motion to expand the receivership to encompass petitioners' personal claims against Tiburon. The district court granted that motion (Pet App. 3a, 29a-31a) and subsequently confirmed the proposed private sale of the land to Tiburon after a hearing. In the order confirming the sale, the district court further directed petitioners to dismiss their personal claims against Tiburon (*id.* at 3a, 19a, 23a-26a).

2. The court of appeals affirmed (Pet. App. 1a-11a). Petitioners conceded that any claim for damages from Tiburon for the decrease in property value caused by the allegedly improper zoning was controlled entirely by the receiver. They claimed, however, that they were personally entitled to pursue a claim against Tiburon for recovery of the interest that accrued on their federal tax debt during the period that a sale of the property had been delayed by the allegedly unlawful zoning. Petitioners also contended that the district court erred in confirming the sale because the real estate appraisers were not disinterested and because the purchase price was not adequate (*id.* at 7a-8a).

The court of appeals held that all of petitioners' claims against Tiburon were personal property subject to attachment and foreclosure (Pet. App. 4a-6a). The court further held that the claims had no value and that the district court thus did not abuse its discretion when it ordered petitioners to dismiss those claims (*id.* at 7a-8a). The court noted that petitioners did not personally own the property that gave

rise to the claims and that, as shareholders, they had no right to bring a personal action for injury to the corporation or its property. The court held that "the causes of action against Tiburon belong[ed] solely to Pine Street Corporation" and that petitioners "had no valid personal claims against Tiburon, regardless of the fact that they are named in the complaints in their individual capacities" (*id.* at 7a).

The court also rejected petitioners' contentions that the real estate appraisers were not disinterested and that the price paid for the property was inadequate (Pet. App. 8a-10a). The court pointed out that "[a]n attorney experienced in land use litigation * * * ultimately concluded that there is a low probability of a recovery exceeding the current purchase offer, plus the additional cost of litigation and the continuously accruing interest on [petitioners'] tax liability" (*id.* at 10a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

Petitioners do not dispute that the United States is entitled to foreclose upon and sell their property in satisfaction of their long outstanding tax debts (Pet. 13). Petitioners instead contend (Pet. 13-21) that they were denied due process of law when the district court did not allow them to conduct discovery in the actions filed by the receiver. That contention is without merit.[3]

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[3] The issue that petitioners raise in their petition was not adequately raised in the court of appeals. The claim that additional "discovery" was required by the Due Process Clause was

Petitioners do not own the property involved in the litigation that the receiver commenced and subsequently settled. They are only shareholders of the corporation that owned the property, and their shares in that corporation are held by the receiver. Moreover, as the court of appeals pointed out (Pet. App. 6a), *if* petitioners had a cause of action, that right of action was also "property" subject to the government's lien and was thus also one of the assets transferred to the receiver for liquidation. Under the applicable state law, petitioners thus had no right to pursue any cause of action independently of the receiver. See *Sutter* v. *General Petroleum Corp.*, 170 P.2d 898, 900-901 (Cal. 1946); *Jones* v. *H.F. Ahmanson & Co.*, 460 P.2d 464, 469-471 (Cal. 1969); *Kruse* v. *Bank of America*, 248 Cal.Rptr. 217, 233 (Cal. App. 1988), cert. denied, 488 U.S. 1043 (1989). Moreover, as the court of appeals stated, "[w]ell-established principles of corporate law prevent a shareholder from bringing an individual direct cause of action for an injury done to the corporation or its property by a third party" (Pet. App. 7a). Petitioners have no valid personal claims against Tiburon, and the Due Process Clause does not entitle a person to conduct discovery on a claim that is foreclosed as a matter of law.

Moreover, petitioners had no right to conduct discovery with respect to the claims of the Pine Street Corporation. The receiver, not petitioners, had exclu-

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first raised as a separate issue in the petition for rehearing in the court of appeals. Issues raised for the first time at that late stage of the proceedings are generally deemed waived. See *Hightower* v. *Texas Hosp. Ass'n*, 73 F.3d 43, 44 (5th Cir. 1996); *DeWeerth* v. *Baldinger*, 38 F.3d 1266, 1274 (2d Cir.), cert. denied, 115 S. Ct. 512 (1994); *United States* v. *Lewis*, 798 F.2d 1250 (9th Cir. 1986).

sive control over the stock of the Pine Street Corporation and was authorized to manage and conserve the assets of that corporation pending sale of the assets in foreclosure (Pet. App. 16a). See *Loeb* v. *Berman*, 20 P.2d 685, 686 (Cal. 1933).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
DAVID ENGLISH CARMACK
ROBERT W. METZLER
Attorneys

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